Vulcan-Hart Corporation (St. Louis Division) ***and*** **Stove, Furnace and Allied Appliance Workers International Union of North America, AFL-CIO, Local No. 110.** Case 14-CA-13129

June 14, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 18, 1980, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed a brief in answer to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

1. In its exceptions the Respondent contends that the Administrative Law Judge's bias and prejudice warrant reversal of his Decision and dismissal of the complaint. In the alternative, the Respondent argues that this proceeding should be remanded for a hearing *de novo.*

In support of this contention, the Respondent asserts, *inter alia,* that the Administrative Law Judge conducted the hearing held in this proceeding in a partisan manner, improperly excluding evidence proffered by the Respondent in its defense, and showed partiality toward the General Counsel's witnesses by crediting their testimony, even when implausible, over that given by the Respondent's principal witnesses.

The Respondent's assertion that it was unfairly precluded from adducing evidence in its behalf is totally without merit. To be sure, the Respondent was unsuccessful in its effort to obtain by subpena a wide-ranging examination of union records, internal memos, and minutes and, similarly, to adduce testimonial evidence concerning the Union's bargaining strategy. However, the Respondent readily concedes that the object of this evidentiary quest was to prove that Lindhorst, president of the Local and the Union's chief negotiator, was motivated by malevolence toward Klohr, his management counterpart, and not by bona fide collective-bargaining considerations, in encouraging employees to reject the Respondent's October 3, 1979, proposal.[1] Such evidence is of no probative value in ascertaining *employee* sentiment and its effect upon their decision to remain on strike and thus affords no basis in law for finding that the strike was unprotected or that the Respondent was somehow absolved thereafter from its statutory duty to bargain in good faith.

In a similar vein, the Respondent asserts that the Administrative Law Judge would not permit General Manager Klohr to testify that employee replacements told him "they had no use for any union and particularly Local 110 . . ." in support of its contention that there existed objective grounds for doubting the Union's continued majority status. This assertion is plainly specious. Our examination of the record reveals that, on the occasion cited by the Respondent, the Administrative Law Judge repeatedly invited Klohr to relate what replacements said to him about the Union. And in his testimony, Klohr mentioned only two replacements: one (Blackman) who purportedly told him that "he thought [the Respondent's October 3 proposal] was a very good contract," and another (Crestwell) who said he was "totally disenchanted" with the way collective bargaining had been handled at the plant of a former employer. The General Counsel objected only to the testimony pertaining to Crestwell, as irrelevant, and the Administrative Law Judge excluded it on that basis.

The Respondent's contention that the Administrative Law Judge "kept corroborative evidence out of the record," thus structuring testimony in a manner most favorable to the General Counsel, is likewise without merit. On the occasion cited, the Respondent's counsel sought unsuccessfully, during his cross-examination of Lindhorst, to elicit testimony concerning an alleged assault upon one Rosenhauer, a striker replacement, in the vicinity of the picket line. Questioning in this area clearly went beyond the General Counsel's direct examination. Addressing the latter's objection, counsel for the Respondent asserted that this was relevant to a question concerning employees' rights to reinstatement, which, the Administrative Law Judge observed, was not relevant to the General Counsel's complaint allegations. Subsequently, in the presentation of its case, the Respondent was permitted to adduce evidence concerning this picket line incident through the testimony of General Manager Klohr. Insofar as the Respondent may have deemed corroboration desirable, we have searched the record in vain for it. In this respect, the Respondent failed either to recall Lindhorst as an ad-

[1] All dates herein refer to the year 1979 unless otherwise indicated.

verse witness or to produce Rosenhauer, who did not testify, as a witness on its own behalf. In these circumstances, the Administrative Law Judge's unwillingness to credit Klohr as a reliable witness hardly evidences bias or prejudice on his part. Indeed, after careful review of the entire record herein, we conclude that the Administrative Law Judge's credibility findings are not contrary to the clear preponderance of all the relevant evidence. Accordingly, we find no basis for disturbing those findings and we reject the charge of bias and prejudice on the part of the Administrative Law Judge.[2]

2. The Respondent also excepts to the Administrative Law Judge's conclusion that the economic strike, which began on September 21, was converted to an unfair labor practice strike on and after October 16. Specifically, the Respondent asserts that this conclusion was improperly grounded upon a finding that it had engaged in unlawful conduct which was neither alleged in the complaint, litigated at the hearing, nor urged as such by the General Counsel in his post-hearing brief to the Administrative Law Judge. We agree.[3] Accordingly, as the Respondent cannot be found to have violated the Act by engaging in the conduct here in question, such conduct cannot be the predicate for an unfair labor practice strike finding, even if a causal connection between it and a prolongation of the strike can be demonstrated.

However, as more fully set forth in the Administrative Law Judge's Decision, conduct warranting an unfair labor practice strike finding did occur on October 30 when, in total disregard of its statutory obligations, the Respondent discharged 19 striking employees, or approximately one-half of the unit here involved. Such conduct, a blow to the very heart of the collective-bargaining process, leads inexorably to the prolongation of a dispute. In these circumstances, we find that the employees involved in the walkout became unfair labor practice strikers on and after October 30 and are entitled to reinstatement whether or not others have since been hired to take their places.[4]

3. The General Counsel excepts, *inter alia*, to the Administrative Law Judge's failure to conclude specifically that the Respondent violated Section 8(a)(3) and (1) of the Act by offering to reinstate Lindhorst to his former job upon the condition that he resign from union office and agree not to run for office during the following 3-year period. The General Counsel also excepts to the Administrative Law Judge's failure to remedy the aforesaid violation. We find merit in these exceptions.

Based upon the credited testimony, the Administrative Law Judge found that on October 3, after the strike began and while bargaining over a new contract was still in progress, Tockman, the Respondent's counsel, drew Lindhorst aside and suggested that he might be permitted to return to work along with the striking employees upon ratification of a new agreement. In return, Tockman advised Lindhorst that he would be expected to resign from union office and drop the pending arbitration case involving his April 20 discharge.[5] Pursuant to Tockman's further suggestion, Lindhorst spoke the next day with Klohr, who repeated the proposal, adding that Lindhorst would have to sign a statement to the effect that he would not run for union office for the duration of the 3-year collective-bargaining agreement.[6]

The Administrative Law Judge concluded that the foregoing conduct constituted "the purest form of interference in the employee protected activities and an attempt to undermine the [Union] leadership." Nevertheless, he held that the incident was not of sufficient importance to be addressed specifically. We disagree. The Respondent has here engaged in egregious conduct which is fit for redress. Therefore, in light of the Administrative Law Judge's findings of fact, which were fully litigated and which clearly establish violations of the Act, we specifically find that, by engaging in the aforesaid conduct, the Respondent violated Section 8(a)(3) and (1) of the Act, and we shall modify the Administrative Law Judge's recommended Order and notice accordingly.

4. The Administrative Law Judge omitted a provision for interest on the backpay which may be

[2] *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). The failure of the Administrative Law Judge to observe the November 9 date stamp (as he had that of October 30) on a document analyzed in his discussion of Klohr's credibility is not, in our view, so serious an error of observation as to affect the soundness of his credibility determination.

[3] However, we reject the Respondent's further contention that the Administrative Law Judge's conclusion, while erroneous, evidences bias and prejudice on his part.

[4] *Trident Seafoods Corporation*, 244 NLRB 566 (1979). *Astro Electronics, Inc.*, 188 NLRB 572 (1971). See also *N.L.R.B.* v. *Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978).

Alternatively, we would find that the strike was converted from an economic to an unfair labor practice strike on November 1, 1979, when the Respondent withdrew recognition from the Union. In this regard we note that there is evidence that the employees had indicated that the strike would continue until a contract was agreed upon. In light of the withdrawal of recognition, an event which would preclude a contract ever being reached, it is clear that such conduct on the part of the Respondent would prolong the strike.

[5] Indeed, Tockman himself testified that in the course of this meeting he suggested to the Union's International representative: "I think you should seriously consider during this [Lindhorst's] probationary period, having someone else run the show for the Union . . . ."

The Board previously found that the Respondent engaged in retaliatory conduct in violation of Sec. 8(a)(4) of the Act in response to charges filed by Lindhorst following his discharge. See *Vulcan-Hart Corporation (St. Louis Division)*, 248 NLRB 1197 (1980), affd. 642 F.2d 255 (8th Cir. 1981).

[6] Lindhorst refused and subsequently won the arbitration.

due discriminatees. We hereby correct that inadvertence by providing for the payment of such interest, to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Vulcan-Hart Corporation (St. Louis Division), Kirkwood, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraphs accordingly:

"(c) Conditioning employees' reinstatement upon their resignation from union office or upon their agreement not to run for union office."

2. Substitute the following for paragraphs 2(b) and (c):

"(b) Offer to each of the following named employees immediate and full reinstatement to their former jobs or, if such jobs are no longer available, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after November 1, 1979: Hill, Patterson, Huskey, White, D. Lindhorst, Daniels, Carter, Pritchett, Byndom, Oppelz, DeGeare, L. Simpkins Williams, Trifonas, Cox, Miller, Moon, D. Simpkins, Burnette, Oatman, C. Karagiannis, Keyes, Montgomery, Singer, Kaiser, R. Burnia, Moiser, Watson, G. Karagiannia, L. Burnia, T. Simpkins, Yound, and Ranachowski.

"(c) Make whole the above-listed employees for any loss of earnings which they may have suffered by virtue of the discrimination practiced against them by paying them an amount equal to what they would have earned, plus interest, from November 1, 1979, to the dates that they are offered reinstatement."

3. Substitute the attached notice for that of the Administrative Law Judge.

[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). With respect to the backpay involved, Member Jenkins would compute the interest in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain with Stove, Furnace and Allied Appliance Workers International Union of North America, AFL-CIO, Local No. 110, as the exclusive representative of the following appropriate bargaining unit employees:

All production and shop maintenance employees in our South Oak Drive plant, excluding office clerical employees and all supervisors as defined in the Act.

WE WILL NOT discharge, refuse to reinstate, or otherwise discriminate against our employees because they have engaged in concerted union activities or because they have engaged in protected strike activity.

WE WILL NOT condition employees' reinstatement upon their resignation from union office or upon their agreement not to run for union office.

WE WILL NOT deny accrued seniority to any of our employees because they have engaged in protected strike activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the excercise of the rights guaranteed them under Section 7 of the Act.

WE WILL recognize and, upon request, bargain collectively with the aforesaid Union as the exclusive representative of all the employees in the above-described appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL offer the following named employees full reinstatement to their former jobs or, if such jobs are no longer available, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after November 1, 1979:

Hill, Patterson, Huskey, White, D. Lindhorst, Daniels, Carter, Pritchett, Byndom, Oppelz, DeGeare, L. Simpkins, Williams,

Trifonas, Cox, Miller, Moon, D. Simpkins, Burnette, Oatman, C. Karagiannis, Keyes, Montgomery, Singer, Kaiser, R. Burnia, Mosier, Watson, G. Karagiannis, L. Burnia, T. Simpkins, Young, and Ranachowski.

WE WILL make whole the above-listed employees for any loss of earnings plus interest which they may have suffered by virtue of the discrimination practiced against them.

VULCAN-HART CORPORATION (ST. LOUIS DIVISION)

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held in St. Louis, Missouri, on January 29, 30, and 31, and on February 1, 1980, on complaint of the General Counsel against Vulcan-Hart Corporation (St. Louis Division), herein called the Respondent or the Company. The complaint issued on December 6, 1979, based on a charge filed by Stove, Furnance and Allied Appliance Workers International Union of North America, AFL-CIO, Local No. 110, herein called the International. The essential issues to be decided are whether the Respondent illegally withdrew recognition as collective-bargaining agent from Local 110 of the International Union and thereby violated Section 8(a)(5) of the Act, and whether it discharged a number of its employees for engaging in a strike, in violation of Section 8(a)(3). Briefs were filed after the close of the hearing by the General Counsel and the Respondent.

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a State of Missouri corporation, is engaged in the manufacture, sale, and distribution of coolers and freezers and related products, in its plant in the city of Kirkwood, Missouri, the only facility involved in this proceeding. During the year ending June 30, 1979, a representative period, in the course of its operations the Respondent manufactured and sold from this one plant products valued in excess of $50,000, shipped to out-of-state locations. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union directly involved in the labor dispute which gave rise to this case is Local 110, of the named International. In its answer to the complaint, the Respondent disputes the labor organization status of that Local organization. As it developed at the hearing, the attack on its status as a labor organization within the meaning of the Act is based upon assertions other than those that go to its normal structure and regular functioning as a membership organization devoted to representing employees *vis-a-vis* their employers in the collective-bargaining process. The record shows clearly Local 110 has a membership roll, collects dues, elects officers, and, in fact under collective-bargaining agreements, represents employees in the regular negotiation process. Holding in abeyance for the moment the question of whether particular events related to this case disqualify Local 110 from functioning as a regular labor organization, I find that Local 110 of this International Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Picture of the Case*

This International Union's Local 110 has been the bargaining agent, under successive collective contracts, for the production and maintenance employees of the plant involved in this case for 10 years. The last agreement, in effect from 1976-79, by its terms expired on September 21, 1979. The Union's committee and management members met in bargaining negotiations six or eight times before that date, but with no agreement reached the employees struck at midnight of September 21. Of the approximately 38 employees involved, all but 3 ceased work. The strike was still in progress at the time of the hearing 5 months later.

The parties met again in a bargaining session on October 3, and after several hours of discussion a tentative agreement was reached, subject to ratification by the employees, the union committee saying it would recommend acceptance. At a union meeting several days later, employees rejected the Company's offer by a great majority.

The parties met again on October 12, where again after extended negotiations a number of language changes were made in the proposed contract at the Union's request. On October 16, the Company wrote a letter to every employee, inviting them to return to work and saying it would immediately put into effect every increased benefit—including direct raises in pay—which it had offered the union committee. The letter stated that operations would be resumed on October 22, that any striker who did not return would be replaced, and that this was being done because the employees had rejected the Company's last offer. Attached to this letter was a detailed copy of the substantive terms of the Company's offer, including the pay raises and other increases in economic and fringe benefits.

The Company also wrote a second letter to each striker individually on October 22. After telling them it had started to hire new employees, the letter stated, among other things, that "each person who has been replaced . . . has, by not coming to work, lost his or her right to immediate reinstatement when and if the current strike is settled. . . ." By the end of the month, two or three strikers had returned and some replacements had been hired.

There were further meetings between the parties, the Company raising some of its economic proposals, including further offers of pay increases. By letter dated No-

vember 1, the Respondent wrote a letter to the Union saying it was withdrawing recognition and would no longer bargain with it. In consequence of that letter, the parties never met thereafter.

A final letter to a substantial number of the employees who were on strike was written and sent out on October 30. This one started by saying, "This is to inform you that your employment with this Company has been terminated by the hiring of a permanent to replace you." The letter then went on to explain how the employee had permanently lost any right to continue in effect his "insurance coverages" by payment of the premium through the Company "because of your loss of employment status," and added that he would soon be advised of any rights he might be entitled to under the Company's pension plan. The letter closed with saying that, if the employee had any thought of ever again working for the Respondent "as a new employee," he should keep the Company advised.

During November a few more strikers returned to work, but a majority of the original group are still on strike. In January, the Company ignored a written request for bargaining by the Union.

The complaint alleges that as to each employee to whom it sent its October 30 letter, the Respondent in fact discharged them and thereby illegally discriminated against them in violation of Section 8(a)(3) of the Act. The Respondent sent more such letters, in exactly the same language, to still other strikers during November. As to those employees also the complaint alleges like further violations of Section 8(a)(3).

A second major allegation is that by withdrawing recognition from the Union as exclusive representative of its production and maintenance employees on November 1, the Company unlawfully refused to bargain, and thereby violated Section 8(a)(5). There are further allegations of violations of Section 8(a)(1)—restraint and coercion—which will be pinpointed below.

B. *The Defense Contentions*

Denying the commission of any unfair labor practices, the Respondent advanced, at the hearing, a number of affirmative defenses which cannot all be clearly stated. There is a vague, conclusionary quality that pervades all of them. The only one I can clearly set forth is the assertion that, when it withdrew recognition from the Union on November 1, the Company had "objective considerations" to justify such conduct.

As to the discharge of a great number of strikers, some before November 1 and some after, the Respondent explains its letter of October 30, which in so many words told each striker he was no longer an employee of this Company, as no more than advice that he had been "replaced."

A more pervasive argument, obliquely repeated again and again throughout the unduly extended record of testimony, rests upon the single fact that throughout the bargaining negotiations, and continuing later during the strike, there existed a personal antagonism between the principal company negotiator and the president of the Local Union. In April 1979, Richard Klohr, the plant manager, fired William Lindhorst, a production employee, for "raising hell" and being "insubordinate" to him, as Klohr said at the hearing. Lindhorst filed a grievance. Although, thus, in laid-off status, Lindhorst was elected president of the Local Union in June. When the parties met in bargaining sessions, with both Klohr and Lindhorst as leading spokesmen, Lindhorst's grievance was about to reach the final arbitration stage. That Klohr disliked Lindhorst, resented his very presence at any meeting, and held him personally responsible for all the ills that befell the Company throughout the events giving rise to this case could not be clearer from the totality of his testimony. And while Lindhorst sounded less antagonistic toward the man who had fired him, I think it fair to hold, again considering all the relevant factors, that he felt no special affection toward him. Based on this one reality of record, counsel for the Respondent, on its behalf, articulated a number of facts and a number of consequent conclusions of law, as follows: (1) Lindhorst's purpose, in leading the employees to strike, was not to further their economic interest—that concerted activity protected by the statute—but to cause such financial hurt to the Company that it would fire Klohr. (2) When the employees voted to reject the Company's October 3 offer, they did so because Lindhorst lied to them about the agreed-upon provisions, hid from them the true concessions, and deliberately misled them in order to advance his personal vendetta against the plant manager. (3) If the mass majority of the employees continued to strike, it was not because of allegiance to the Union, or any resolve to press their concerted demands for improved conditions of employment, but instead out of fear of personal injury engendered by Lindhorst and his intimates.

From all this, the Respondent then makes a number of further arguments. Since the Local Union, led by Lindhorst, was not engaged in honest collective bargaining, the Company was never obligated to deal with it at all. The purported supporting analogy is *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954), where the demanding union was engaged in a commercial enterprise in direct competition with the employer. Next, a number of strikers, co-conspirators with Lindhorst, were not really strikers but rather engaged in disruptive tactics aimed at destroying the Company. They were therefore neither protected from discharge nor in any event entitled to reinstatement tomorrow. And finally, because the employees had been misled, and because they had been intimidated, it follows they had disaffected from the Union, and no longer wanted to be represented by it. Ergo: Regardless of whether or not the record shows the kind of "objective considerations" which under Board law alone can justify withdrawal of recognition (See *Celanese Corporation of America*, 94 NLRB 664 (1951)), the Respondent was never under any obligation to bargain with Local 110.

It is all one ball of wax. This because the personal antagonism between the general manager and the union president is really used to support every conceivable aspect of the Company's multiphrased defense.

C. *Further Evidence, Analysis, and Conclusions*

On the basis of the entire record, I find no merit in any of the Respondent's defenses.

We start with the literal withdrawal of recognition on November 1. Holding in abeyance for the moment the idea that the Union never represented these people at all because of Lindhorst's alleged machinations, did the Respondent have objective grounds for doubting continued majority status in the long-established agent?

When the Respondent wrote to each and every one of the strikers on October 16 that, if they would come back to work, it would pay them more money than they were earning before going on strike, it committed the first of a number of acts which today absolutely deny it the right to assert it had objective basis later for doubting the Union's continued majority status. It literally bypassed their statutory bargaining agent, in direct disregard of the law, which binds the employer to deal with—and only with—the majority representative. Moreover, it was offering direct payment to induce their abandonment of both the Union and their protected right to act in concert. And it did in fact—before withdrawing recognition from their Union—pay the three strikers who returned the added money. Objective grounds for questioning majority means the employer learns of employee activity—born within them entirely apart from employer inducement—rationally indicating voluntary abandonment of their union. The immediate grant of more money was both a refusal to bargain within the intendment of one section of the Act, and a discrimination, againt prohibited by the Act, to coerce rejection of union representation. For the Respondent now to say all this proves the employees independently rejected their old union is but a play on words.

This improper bypassing of the Union took other forms as well. Management agents talked to strikers on the picket line—still during the month of October—trying to sell them the advantages of its contract offer which the employees as a total group, acting through their Union, had rejected. A very revealing aspect of this approach is reflected in the activities of one Melvin Pittle, the chief of a private guard service hired by the Company during the strike—"to record any incidents . . . untoward to the Company or to the strikers . . . to protect . . . the Company and the property." During October, in the several talks between company and union agents in negotiations, there was much disagreement about certain overtime provisions the Company demanded in a final contract; agreement on that important issue was never reached. Pittle testified that late in October, while on duty as a guard, he had three or four copies of a few pages of the Company's last proposals to the Union, the ones dealing with the disputed overtime issue, in his hands and showed them to three strikers on the picket line—Charles White, Jim Williams, and William Cox. Pittle explained at the hearing that he had talked with some strikers earlier and had learned that a reason for the strike was the question of the overtime issue. He went on to testify that he asked the three strikers to read the copies he had in his hands. "I explained to them that they had told me over a period of time that the objections to signing was the overtime. And expressly asked them, 'Have you seen this contract for yourself or are you only judging by what you are told?'" When one of the strikers, Williams, said he had not seen the contract, the guard went on: ". . . . Would you be interested in reading it and what would your reaction be if you found it to be different than what you've been told?" Although Williams responded he did not think his position would change, Pittle gave each man a copy. His testimony continues: "And after that they gave it back, returned it. And their indication after reading it was that they had been misled. This is what they told me. 'They said, This does not say what we were told.' And Charlie White stated that they felt he had been lied to." Pittle ended by saying he reported all this to Plant Manager Klohr. His testimony here set out is now said to help prove the Respondent's claimed objective basis both for its withdrawal of recognition and its contention that this was not an honest strike but a plan to destroy the Company.

I do not believe Pittle's story about what any employee told him. Charles White was called as a witness by the Respondent and said not one word about any conversation with the guard. Williams was not called to testify at all. And Cox, called by the General Counsel in rebuttal, denied any talk with Pittle about the contract, or even that the guard ever showed him any document at all. His testimony is that it was Klohr who gave him those reprints on the picket line, and that another striker, Paul Doehmelt, was then with him. Cox said the two strikers tried to convince Klohr to come to a union meeting and explain things to the employees, but that Klohr refused. The witness then quoted Klohr: "He just said he thought the union was giving us a ripoff." This was management trying to implant in the minds of the strikers the idea that the Union officers, or committeemen, were frauds, and that the strikers should abandon their leaders, not the employees giving the Respondent objective basis for concluding they had quit their Union voluntarily. In fact, a fair appraisal of all Klohr's testimony supports a finding that a number of times, in his talks with strikers, it was he, not they, who urged the view they were deliberately being misled.[1]

[1] In his greatly repetitive and conclusionary testimony, Klohr testified about conversations with Waller, a striker. At times he said Waller came with three other strikers, at other times he said Waller came alone or with only one or two others. But at one point Klohr said that "in late October or early November" Waller said to him "he was very fed up with Bill Lindhorst. He figured the Guy was just leading him down to perdition." Klohr continued that he reported this in writing to his superiors and produced what he said was a contemporaneous record he made. It reads as follows:

> I asked Waller why he was out there and he said "Hell, I don't know everyone is so confused. Lindhorst says vote for this or that and we do. I said do you understand that overtime issue and he said—yes—hell, I ain't against overtime—you know that. I said why are the people out there then. He said they think it's a big contest between you and Lindhorst—'why don't you give in, Dick.'" "Give us the five unexcused absences in a 8 week period. You give five overtime refusals—what's the big deal?" I said the big deal is that Lindhorst is holding you guys out there to get more and there isn't going to be any more. I got my butt chewed out for giving more because I was assured that that would get a contract. I was lied to just like you're being lied to during this strike. The overtime issue was taken care of 3 Oct. 79 and your committee concealed the truth from you and lied to you about it. I told him he was Lindhorst's

Continued

But there is more reason for rejecting Pittle's testimony on this heart question. In colorful language he spoke of how he used to converse amicably with the men on the picket line, inquiring about their problems and why they were hurting themselves by striking. He detailed at the hearing how he was "confused," "really not any of my business, but I'm a human being," it was "Christmas," and "I had to look my children in the face at Christmas." Pittle continued that while wandering about the plant inside the offices he chanced to see on the manager's desk a copy of the proposed contract, read it, and realized this was about the overtime question that was causing the trouble. So he made a few copies. He added he talked to Klohr about it by saying: "If this is that contract," I said, "Obviously, they couldn't have seen it because they are telling me that there is mandatory overtime and this does not indicate what they are saying." At its critical points, Pittle's testimony reads like a paraphrasing of the Respondent's basic defense that of necessity the strikers were being defrauded by the Union. Searching the company offices and selling the Employer's view to striking employees are not functions encompassed in the duties of a security guard. No amount of descriptive argument in justification can make Pittle's story credible. I have no reason for not believing his or Klohr's testimony that the two decided Pittle should go outside and explain to the men why they were wrong in continuing the strike. But on the total record, I am convinced that it was Klohr, using Pittle as his agent, who devised the technique of this dealing unilaterally with the employees in order to avoid continuance of the collective-bargaining process dictated by the statute.

Pittle told another story. He said that as he talked with Lindhorst on the picket line, the union president told him that 2 weeks before the strike he, Lindhorst, had caused a slowdown in order to put the Company in the red, and that his purpose was to see that the company president would fire Klohr. Again, Pittle added he reported this to Klohr. I do not credit his testimony at all.

The attack upon Union President Lindhorst, spoken almost entirely by Plant Manager Klohr, was intended to prove both that the Company had objective basis for doubting majority and that this was not "union activity" at all. Klohr was not a credible witness and his total testimony falls short of proving his essential assertions. There are many reasons for this credibility resolution.

When the strike started Lindhorst's grievance, anent his earlier discharge, was just about to be heard by an arbitrator. In fact it was heard on October 5, 2 days after what Klohr now says was a final settlement with the union committee led by Lindhorst but which Lindhorst deliberately misrepresented to the employees in order to "get" the manager. Understandably, Klohr was vexed with the man, to say the least; he knew they were on the verge of giving each other the lie as to whether the employee had really been "insubordinate" to the boss. The two must have irritated one another on October 5, and the strike continued, into the very period—the next 2 or 3 weeks—when, according to Klohr, he learned of Lindhorst's misconduct. And, when Klohr first took the stand in this case as a defense witness, on January 30, it was exactly 5 days after the arbitrator had issued his decision ordering Lindhorst's reinstatement.

Klohr's testimony—he testified on 2 separate days—is ridden with continuing conclusionary phrases, vague statements of opinion, and repetitive hearsay reports of what returning strikers told him was their opinion of Lindhorst as a union official. And in a number of very precise quotations which the witness attributed to named employees, these employees appeared as witnesses and contradicted him outright. Indeed, some were even called by the Respondent!

Klohr testified that on the picket line one day he discussed the terms of the Company's proposals with strikers Williams and Oatman, and that they told him they had been misinformed about a certain overtime provision at the union meeting by Lindhorst. Later both of these men returned to work across the picket line. Williams did not appear at the hearing. But Oatman did come as the Respondent's own witness. He said he did see "the initial agreement" on or about October 3 (this was the Company's offer which the employees rejected). Oatman was on the Union's bargaining committee; he surely must have seen whatever agreement was reached there. After saying he returned to work because he "needed the money," Oatman then very clearly stated he had no conversation at all with Klohr outside the negotiation meetings. Klohr also testified that on October 24 striker Glenda Robertson telephoned him and said "she wanted to come back to work but she was fearful." Robertson was also later called as a witness by the Respondent, and said she only returned to work because she "needed my job," and that her sole concern was over her "co-workers" being outside while she was inside. She then said all she told Klohr was she wished to come to work and asked whether the Union could do other than fine her for crossing the picket line. Klohr answered she should consult the NLRB. Robertson closed with saying she said nothing else to the manager and that she never spoke about Lindhorst to "any boss at the plant."

Again, Klohr testified that in mid-October he had a conversation with Stella White—the first striker to return. He quoted her: "She indicated that the people felt that the main reason that they were out was because of a conflict between Dick Klohr and Joe Lindhorst. She said that they felt that if Klohr and Lindhorst weren't around then all the people would be back to work." Klohr also quoted White as saying to him: "She said there were many, many people out there that wanted to come across but they were all afraid of Lindhorst." The witness colorfully added that White was a "courageous little girl I will tell you." All of this recital by Klohr was com-

---

slave. He said "I could never live with my old man—he would come back to haunt me if I ever crossed a picket line." I said, "If the kind of irresponsible union leadership you have out there inspires you to stay out then you can only hope to reap what you sow. I told Gordon the only thing, unfortunately, that these people, in a group, understand is force. Try to be nice or give in and they take that as a sign of weakness and they will endeavor to exploit you. Again, I offered my resignation and he indignantly reiterated that that would solve nothing and that we must stick by our stand."

This was not the employee turning against his union. It was the manager, as recorded in his own hand, giving vent to his hate of Lindhorst and trying hard to forment discord within the Union.

pletely denied by White herself. She testified that all she ever told Klohr was she wanted her job back and nothing else. When a respondent calls two witnesses in defense and the employees who turned against the Union as strikebreakers give the lie to the supervisor who puts antiunion words in their mouths, which of them is the respondent vouching for? I certainly believe White's denials.

Still, according to Klohr, Paul Doehmelt, a striker who returned to work on October 23, telephoned him twice the day before to say ". . . he was concerned about was coming back to work. He was afraid because of threats that had been made to him. And that he would have been back sooner except he did not want to get hurt." Klohr added that later Doehmelt told him he had "received several threatening telephone calls because he had come back in." But Doehmelt, also a witness, testified that he said nothing to Klohr when he returned to work, and only came back not to lose his job of 25 years. As to any earlier conversations, he said he only called the day before to ask was the job open, and was told yes. The witness made clear he never talked to Klohr otherwise.

The story goes on and on in like fashion. There would be no point in detailing it all. A final indication of how unreliable Klohr's total testimony is will suffice. At one point he said that on or about November 1 a strikebreaker—one Rosenhauer—reported to him that he had been threatened and physically assaulted by union pickets. Rosenhauer did not testify. To support his oral recollection, Klohr produced two documents which he said were made in his usual way and therefore proved the purported conversation. One is a handwritten note, in his own hand, stating that Rosenhauer had related to him how "Bill Oppelz and Don Patterson" had assaulted him. This slip bears the stamp "Nov. 1, 1979." The second document is a full page, single spaced, typewritten story, signed, Klohr said, in Rosenhauer's own hand. It tells a long story of the man being called a scab, having a stick waved at him, being invited to fight, and having a "bottle's worth of beer" thrown into his face. It is a revealing piece of paper. Nowhere, in type, does the name Oppelz or Patterson appear. Klohr said the statement was written in long hand by Rosenhauer, at the manager's request, and then typed by Klohr's secretary. But in the margin, in Klohr's handwriting, appear the names "Bill Oppelz and Don Patterson." Klohr said he added this: he also said Rosenhauer wrote out his handwritten report on November 9. But if Rosenhauer knew, on November 1—as Klohr said he noted at the time—the names of the men who had assaulted him, he would have put them into his later written statement. To cover this gap, Klohr said he personally, not Rosenhauer, learned the identity of the attackers by passing Rosenhauer's description to a security guard, who "felt" it must have been those two particular men. Klohr also said he himself added to the typewritten document placed in evidence the place of the occurrence—"in front of the plant." And to top it all the only date appearing on the paper is stamped "Oct. 30, 1979."

I deem this typewritten exhibit a completely fraudulent, self-serving document. It serves only to help discredit Klohr all the more as a witness in this case. I do not believe a word he spoke about any conversation with striker Rosenhauer.

As set out above, on October 30, the Respondent mailed a personal letter to each of 19 strikers, telling everyone of them that he was no longer an employee of this Company. Artfully, at several places, the language of the letter speaks of the strikers having been "replaced" or "permanently replaced." It matters not whether such a letter used the word "fired" or "discharged." It is enough that the message made clear the employee had lost all status as an employee. It was a "discrimination in regard to hire or tenure of employment" as the phrase appears in Section 8(a)(3) of the Act. That the reason why the Respondent so cut off the employees' employment was because they had chosen to strike could not be clearer and deserves no further comment. And that the discharge of a man for striking is an unfair labor practice hardly calls for discussion here. *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967).

Every argument advanced by the Respondent during the hearing and in its brief, intended to classify this discharge letter as no more than a correct statement of Board law, fails. There is really no need to speak at length in this Decision of all of the diverse contentions articulated, because all of them, regardless of their separate failings, are reduced to complete irrelevancy by a single error of law which underlies the entire defense concept. There is no such thing as permanent replacement of a striker—i.e., such as to permanently cut off his employment status or rights—before the strike is ended, or before the employees as a group offer to return to work. The idea that a man still on strike with his fellow employees—be it an economic or an unfair labor practice strike—can be replaced with finality does absolute violence to Board law. The test of reinstatement rights of a striker can only come when the strike is abandoned. Replacements come and go, as indeed, even this record shows. Of the replacements who are hired, some before and some in the several days after October 30, four quit before October 30, four more quit by November 5, and four more quit by November 16. However the Respondent chose to describe this or that replacement, it is still a fact that that job, the one occupied only temporarily in October by a man then called a "replacement," was open again in November. Had the strike ended then, one of the strikers, even the man who was fired on October 30 because of that particular "replacement," would have had a statutory right to reinstatement—not limited to any right to apply as a "new employee," as he was told in the discharge letter. Cf. *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *General Electric Company*, 80 NLRB 510 (1948).

All this, to say nothing of the fact that, again under the clearest Board law, a striker retains a measure of reinstatement rights even if at the moment the union abandons the strike all positions have been permanently filled. He has a right to preferential recall. *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). When the

October 30 letter told every employee he must file a new application if ever thereafter he should wish to return to work, he was then and there being "discriminated" against, again in violation of legal rights, purely because of the fact he had engaged in concerted strike activity.

Taken together, all the theories of defense, however variously stated, amount to no more than the fact that this Respondent disagrees with, or does not like, established Board law. It classified all the strikers in order of accumulated seniority; it now says that, every time a new man crossed the picket line to work, he was alloted the precise seniority slot of this one striker or that, depending upon when the strikebreaker arrived. It is then argued that strikebreaker A, having replaced striker A—determined by his relative old seniority—caused striker A forever to lose his job. It is a seemingly persuasive position but again ignores Board law. The employer may not accord greater seniority to the replacement than was held by the striker before he went on strike. See *N.L.R.B.* v. *Fleetwood Trailer Co., supra.*

A companion defense argument is that whenever an outsider was hired to fill the particular job previously held by one of the strikers—as the Respondent made explicit in its letters to the strikers, on a one-to-one basis—or whenever the department—there were four—in which particular strikers had worked was filled, the pinpointed striker whose job had been filled or all those in a department which had been filled were therefore automatically "permanently replaced," and lost all status as employees that very moment. This is but another attempt—via a play on words—to avoid the rule that strikers are entitled to reinstatement, whenever the strike ends, on any job that is open and that they are qualified to fill. Here the Respondent would view the single strike as 38 separate strikes, as though each striking employee constituted a separate bargaining unit whose strike had nothing to do with the activities of his fellow workers. The fact is there is no reason for holding that job assignments in this place are not interchangeable, or that a man previously working as an assembler could not do the work of a mounter, framer, or a refrigerator man. There is no proof at all that one man could not do the job of another. Rather, there is proof positive to the contrary. There came a time when the Respondent put certain strikers who broke ranks back to work, and, because the pinpointed assignment he had filled was occupied, placed him on another job. This happened in three or four instances. In short, the whole contention about permanent replacement while the strike was in full progress, however phrased, is just a lot of words meaning nothing.

I find that on October 30, by writing letters to 19 strikers telling them they were no longer employees of this Company, the Respondent illegally discharged all of them and thereby violated Section 8(a)(3) of the statute.[2]

I also find, as precisely alleged in the complaint, that on November 1, by writing to the Union that it was withdrawing recognition, the Respondent refused to bargain in violation of Section 8(a)(5) of the Act.[3] It has not proved, by convincing evidence on this record, that it had objective basis for doubting the Union's continuing majority status. Only the day before it had unlawfully discharged 19 of the strikers. For it now to say all those employees are not to be counted in appraisal of the Union's representative strength on November 1 defies comprehension. It may be true, a fact that is absolutely irrelevant to the issue presented, that by November 1 the number of employees at work amounted to more than half the total number represented by the Union at the start of the strike. But Board law also holds that there is no reason for presuming that strike replacements do not desire to be represented by the striking union. But of a much greater significance in the case at bar is a more fundamental principle of Board law. As the Supreme Court said in *Medo Photo Supply Corporation* v. *N.L.R.B.*, 321 U.S. 678, 687 (1944):

> Petitioner cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority.

It is the realities that count, not words or the particular phrasing of the pleadings in litigation. The truth is the Respondent itself induced at least some of the strikers to quit striking and to abandon their Union, by its own improper behavior *vis-a-vis* their Union. This it did when it unilaterally offered them raises in pay over their previous earnings. This was no impasse, for negotiations between the parties went right on. Meetings took place, telephone conversations were had, and the Company kept adding to its economic offers seeking to win acceptance by the Union. Indeed, as late as October 27, only 4 days before withdrawing recognition, the Company's lawyer was authorized by the company president to raise the ante to George Pierson, of the International Union, then speaking on behalf of the Local. He did that, according to his own testimony. If ever collective bargaining can be called a sham, it is when the employer keeps talking to the employees' exclusive representative while simultaneously handing them more money on the side.

These are facts that cannot be ignored, even if no formal findings of illegality in the October 16 letter are made. This reasoning applies with equal force to the activities of the Company's agents before the letter of November 1 in attempting to persuade the employees that they would be better off accepting the Employer's terms

[2] The October 30 letter was that day sent to the following 19 employees: Hill, Patterson, Huskey, White, D. Lindhorst, Daniels, Carter, Pritchett, Byndom, Oppelz, DeGeare, L. Simpkins, Williams, Trifonas, Cox, Miller, Moon, D. Simpkins, and Burnette.

Between November 2 and 14, the Respondent sent exactly the same letter to the following 14 individual strikers: Oatman, C. Karagiannis, Keyes, Montgomery, Singer, Kaiser, R. Burnia, Moiser, Watson, G. Karagiannis, L. Burnia, T. Simpkins, Young, and Ranachowski. The same arguments, pro and con, are made by the parties with respect to these 14 letters and these 14 strikers. For the same reasons set out above as to the orignal group of 19, I find that, as to each of the 14 strikers whom the Respondent discharged in November, it violated Sec. 8(a)(3) of the Act.

[3] I find, as alleged in the complaint, that the following is the unit appropriate for bargaining in this refusal-to-bargain case: All production and shop maintenance employees in the Company's South Oak Drive plant, excluding office clerical employees and all supervisors as defined in the Act. This is precisely the unit covered by the parties' 1976 and 1979 contract, and while the Respondent in its answer disputed its appropriateness, there is no evidence in any way tending to question its correctness.

than adhering to their prounion resolve. Rejection of a union induced by the employer is the opposite of what is called "objective consideration" for questioning majority. The most pertinent fact, which is not proved by hearsay, is that the vast majority of employees stuck to their strike. In sharp contrast to the repeated assertions—without direct evidence—that the employees had become antiunion minded, the very opposite is the clearest thing on this record.

Not only does the record testimony fall short of proving affirmatively Klohr's conclusionary statements that the employees wanted to get rid of Lindhorst, but it contains very substantive and precise testimony that the plant manager was prepared to do anything to remove the Local president entirely from the collective-bargaining picture. It will be recalled that on October 5 Lindhorst's arbitration case—the grievance aimed at winning him reinstatement—was to take place.

Lindhorst testified that at the October 3 meeting, in the FMC office, where the parties negotiated at length, company counsel, Tockman, drew him aside and spoke about the possibility of Lindhorst returning to work with everybody else when the contract was ratified, and that in return Lindhorst was to resign from union office and drop the arbitration case. Tockman also suggested he should speak to Klohr about the matter the next day. Lindhorst's testimony continues that on October 4 he went to Klohr's office where the manager told him ". . . that I would be reinstated in the company with my full seniority and I would be given all my vacation time . . . which ever I preferred, and I would receive no backpay. Also I was to resign my office as president. I was to sign a paper stating that I would not run for office for the duration of the 3-year contract. I was to drop Labor Board charges I had filed against the Company and I was to drop an arbitration case . . . ."

The lawyer's version of this is that in speaking to both Lindhorst and Voerkel, the Union's International representative, he expressed "concern" over the fact a discharged man was so active in the bargaining, that he felt the officers would therefore be "less than enthusiastic" in their recommendations that the employees as a whole ratify the Company's offer, that "we felt very strongly about the situation because in our position—from our position, involved a union officer engaging in certain conduct in front of employees which set a bad example as a union officer." The lawyer also recalled having said "We would recommend . . . that he would be reinstated . . . with full seniority rights . . . that he would be on probation for a period of time." When Voerkel asked, "What difference does it make if he's a union officer or not?" Tockman came back with "I think it sets a bad example for other employees to see someone blow up at management in their presence, and I think you should seriously consider during this probation period, having someone else run the show for the Union . . . ."

I credit Lindhorst against the other two men. For one thing, Klohr, on this very subject, as well as in many other places in his long testimony, was argumentative, evasive, and indirect. As to the lawyer, the admission of concern over Lindhorst's continued participation in the bargaining is an indirect admission that the idea of removing the man from the position was part of the discussion. In any event, for him to have suggested in the conversation that "someone else run the show for the Union" is but a paraphrasing of Lindhorst's more explicit testimony.

In her brief, counsel for the General Counsel asks that a pinpointed unfair labor practice finding be made against the Respondent based solely on this incident. She may be right, but I do not think it important to belabor that legal question here. What is important, as this testimony clearly reveals, is that management was very much opposed to Lindhorst's activities, and itself wanted him out of there. This was before the employees voted to reject the Company's offer, and the major thrust of the defense is that it was starting then that Lindhorst began to frustrate the employees' desires and to make a mockery of the strike. When the lawyer said, before the employee vote, and according to his own testimony, that the union officers "would be less than enthusiastic," he was himself starting the ball rolling on what later was blown up into a full defense of the entire refusal to bargain a few weeks later. The General Counsel correctly describes the October 3 and 4 conversations as "the purest form of interference in the employee protected activities and an attempt to undermine the leadership."

There came a time when the strike, which started on September 22 as an economic dispute, was converted to an unfair labor practice strike. On what date? Again, the realities come into play. For sure, on October 30, or on November 1, it was an unfair labor practice strike, what with 19 violations of Section 8(a)(3) having been committed on October 30, and a direct unlawful withdrawal of recognition on November 1. But the misconduct by management started on October 16, when it effectively frustrated the protected concerted activity of the Union by collaterally bribing the employees away from continued adherence. It was not an impasse situation, where such bypassing of a bargaining agent might have been justified. If Board law can say that an act literally labeled an unfair labor practice converts an economic strike into an unfair labor practice one, I think must be said with equal logic that the same misconduct—the same in substance, that is—albeit not technically labeled illegal, must be deemed to have the same effect. I find this strike became an unfair labor practice strike on October 16.

There is much conflicting testimony running through the record that is really tangential to the main issues of the case. The strike having been converted into an unfair labor practice strike in consequence of the Respondent's unfair labor practices and other improper conduct starting with its October 16 letter, all persons who are hired thereafter and might still be at work when the Union abandons the strike, must be dismissed to make way for any returning strikers. *Mastro Plastics Corp., and French-American Reeds Mfg. Co., Inc.* v. *N.L.R.B.*, 350 U.S. 270 (1956). And all the strikers who were illegally discharged—19 on October 30 and 14 the following month—must be made whole for the entire period, beginning with the day of discharge and ending the day they are reinstated to the jobs they had occupied. *Abili-*

ties and Goodwill, Inc., 241 NLRB 21 (1979). Reinstatement means reinstatement under conditions of employment as they existed the day they were discharged.

Klohr talked to a number of strikers, on the telephone, on the picket line, and in his office. And in December the Respondent sent a letter to almost all the strikers, which at the hearing it contended was an unqualified offer of reinstatement such as to cut off any backpay liability at least from that date. Much of the testimony about the reaction to that letter, as well as about earlier conversations, is vague, indirect, largely hearsay, and much disputed. The Respondent also merged into all this diversified testimony about certain strikers having engaged in improper conduct on the picket line, or otherwise such as to have deprived them of all reinstatement rights under any circumstances, now or hereafter.

It was the General Counsel's stated position at the hearing that this entire business, whether individuals who attempted to return were or were not offered proper reinstatement, and whether the Respondent had a right, as it claims, to reject offers to return by certain other strikers, properly belongs to the compliance stage of the proceeding. Unless it first be found, in final litigation, that the strikers were in fact discharged, these questions would never be reached. Some witnesses, while testifying about the alleged unfair labor practices, said they would not accept whatever it was the Company was offering them until the strike ends; others were not permitted to answer the question from the witness stand.

There is, however, one reality that must be made clear now, because it bears a very material relationship to whatever the compliance questions may be and because the record as it stands warrants the factual finding. The charge in this case was filed on November 2, 1979, including an allegation that strikers had been discharged, and the complaint issued on December 6, 1979. Beginning on December 5, and a number of times during the next 2 weeks, the Respondent mailed a form letter—with the return dates variously inserted—telling individually named striker there was a "job opening available" for him, that he could report "for this vacancy" by a certain date if he were "interested," and that if he did not it would be assumed he did not want the job. Some employees came back to work, a few came back but were rejected, but most of the strikers ignored the letter.

I find, on total record, that the Respondent did not offer adequate reinstatement to the discharged employees by this letter. The discharge letter—bearing the date of October 30, even when mailed out in November—expressly told each man, more than once in the same message, that, if he ever came back, it would be "as a new employee." Between November 13 and 20, 12 strikers returned to work. Upon arrival, each was required to complete an employment application (and each that day, at the Respondent's suggestion and with the Respondent's clerical assistance, wrote a resignation from the Union). More important, as Plant Manager Klohr testified clearly, each man was assigned a new seniority date "for purposes of layoff had [sic] recall." The Respondent did not equivocate as to this at the hearing. It meant that every one of the returning strikers was subject to layoff before any strikebreaker who had been put to work before his so-called reinstatement. But this is exactly what seniority is all about; whose status is more secure, the strikebreaker or the returned striker? Again, the Respondent was simply flouting Board law, which says the most direct illegal discrimination is to deprive the striker of his seniority because he struck. By denying the previously earned seniority rights, the Respondent was not then offering, and has never since offered, adequate reinstatement opportunity to any striker. I therefore find that as of the date of the hearing the Respondent has never offered any striker a bona fide or adequate reinstatement. *American Distillery Company*, 245 NLRB 454 (1979). As to every man who received that December letter, it matters not, insofar as his make-whole rights are concerned, how he reacted to it. Moreover, the Respondent has failed to establish a legitimate and a substantial business objective for such denial of accrued seniority previously earned by the strikers. Cf. *Freezer Queen Foods, Inc.*, 249 NLRB 330 (1980).

Some things of necessity will abide the events. Whatever money those strikers who returned have earned will, of course, constitute interim earnings in the compliance figures. But if there should be any discrimination against them because of the denial of their full seniority rights, it will be an unfair labor practice under the statute chargeable to the Respondent.

In repetitive detail the complaint lists what on its face appears to be successive unfair labor practices committed by the Respondent in implementation of its actual discharge of all of 33 strikers, as already found herein. After telling 19 strikers on October 30, and 14 more later, that henceforth their status would only be as "new employees," the Company wrote further successive individual letters to all of them, reminding them of how they were no longer employees and advising them to keep the Company informed if they wished to be considered for future hire, sometimes telling them to give 5 days' advance notice, sometimes suggesting other defensive measures on their part. All these letters were no more than restatement of the fact the employees had been discharged with finality. They were all intended to continue the coercion—to force them into abandonment of the Union and the strike—achieved in the fact of discharge. The General Counsel asks for pinpointed unfair labor practice findings with respect to each and every such letter. But no purpose would be served by discussion at length here of what was no more than a continuation of the Respondent's overall illegal treatment of the strikers.

This pointless repetition also appears, both in the complaint and in the General Counsel's brief, in the fact of denial of earned seniority to returning strikers. Some who returned were told they had lost their seniority—for layoff or recall, others were told they would lose it the day they might be rehired. With the overall finding already made that it was, is, and will always be an unfair labor practice for the Respondent to deny such seniority to returning strikers, both those who have come back and others who were still on strike at the time of the hearing, it follows that any implementation of such an illegal policy is, and will be, an unfair labor practice at any time in the future. This record does not show

whether any returned striker has already suffered discrimination on that basis, but it is enough to say that, if the Respondent ever in fact hurts a man for that reason, it will pay for that unfair labor practice one way or another. In the circumstances of this case, it is more important to issue this Decision on the basic issues, than to delay it by belaboring the obvious.

This approach—to ignore the superfluous in the interest of an expedited decision—applies as well to still other inconsequential details. For example, two men—Young and Pritchett—attempted to return when invited but were refused employment. The refusal was no more than confirmation of the illegal discrimination in violation of Section 8(a)(3) in the discharge.[4] A number of people came back late in November, but were not given their full seniority. I see no purpose therefore in finding additional unfair labor practices as to each of these men.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and a substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

The Respondent must, of course, be ordered to cease and desist from again committing the unfair labor practices of which it has been found responsible. Affirmatively, it must be ordered to bargain with the Union in good faith on request. It must be ordered to offer complete reinstatement to everyone of the 33 named employees it discharged on October 30, 1979, and during the month of November. This affirmative remedy applies as well to every striker who ever came back to work during the strike in November, because the fact is that the job he was given did not constitute adequate reinstatement—as the term is used in Board law—to the job he had held, for it was minus his earned seniority. Any money the November returnees earned is interim pay, but that is another matter.

There were four strikebreakers who returned to work before the October 30 letter of mass discharge. They, too, were denied their previously earned seniority, and the reason for such denial, as admitted candidly by the Respondent, was because they had joined the strike. The remedial order here therefore includes these four persons also among the total group that must be offered an assured unqualified reinstatement.

[4] Manager Klohr testified he refused to reemploy Young because it had been reported to him that Young had threatened a returning striker with a gun on the picket line, and that when he accused Young of having done that the employee denied it. The man now said to have reported such threat to Klohr was never produced as a witness. Young denied ever having a gun with him anywhere near the plant. I believe him and, again, do not credit Klohr.

CONCLUSIONS OF LAW

1. By withdrawing recognition from Stove, Furnace and Allied Appliance Workers International Union of North America, AFL-CIO, Local No. 110, as the exclusive representatve of employees in the appropriate bargaining unit, the Respondent has violated and is violating Section 8(a)(5) of the Act. The appropriate bargaining unit is:

> All production and shop maintenance employees in Respondent's South Oak Drive plant, excluding office clerical employees and all supervisors as defined in the Act.

2. By discharging the 33 employees named in footnote 2 herein, for engaging in protected strike activity, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

3. By denying returning strikers previously earned seniority rights for the reason that they had engaged in protected strike activity, the Respondent violated and is violating Section 8(a)(1) of the Act.

4. By all of the foregoing conduct the Respondent has violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[5]

The Respondent, Vulcan-Hart Corporation (St. Louis Division), Kirkwood, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with the aforesaid Union, upon its request, as the exclusive representative of all employees in the appropriate unit.

(b) Discharging or in any other manner discriminating against its employees because of their union or protected concerted activities.

(c) Denying its employees any earned seniority rights in retaliation for their having engaged in protected strike activity.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with Stove, Furnace and Allied Appliance Workers International Union of North America, AFL-CIO, Local No. 110, as the exclusive representative of the employees

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to each of the following named employees immediate and full reinstatement to their former jobs or, if such jobs are no longer available, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired after the date of their unlawful discharge: Hill, Patterson, Huskey, White, D. Lindhorst, Daniels, Carter, Pritchett, Byndom, Oppelz, DeGeare, L. Simpkins, Williams, Trifonas, Cox, Miller, Moon, D. Simpkins, Burnette, Oatman, C. Karagiannis, Keyes, Montgomery, Singer, Kaiser, R. Burnia, Moiser, Watson, G. Karagiannis, L. Burnia, T. Simpkins, Young, and Ranachowski.

(c) Make whole the above-listed employees for any loss of earnings which they may have suffered by virtue of the discrimination against them by paying them an amount equal to what they would have earned from the date of discharge to the dates that they are offered reinstatement.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Kirkwood, Missouri, plant copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 14, after being signed by its representatives, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

---

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."